INDEX

CITATIONS

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1965

No.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

C & C PLYWOOD CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on September 10, 1965.

OPINIONS BELOW

The opinion of the court of appeals (Appendix A, *infra*, pp. 14-23) is not yet officially reported. The Board's decision and order (Appendix B, *infra*, pp. 25-36) are reported at 148 N.L.R.B. 414.

JURISDICTION

The judgment of the court of appeals was entered on September 10, 1965 (Appendix A, *infra*, p. 24). On December 10, 1965, Mr. Justice Douglas extended the time for filing a petition for certiorari to and including January 8, 1966. This Court has jurisdiction under 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act (29 U.S.C. 160 (e)).

QUESTION PRESENTED

Whether, where an employer changes the wage rates of his employees without bargaining with their union representative, contending that such unilateral action is permitted by the collective bargaining agreement between the parties, the National Labor Relations Board is without power to decide whether an unfair labor practice has been committed until the contract issue has first been decided by the courts.

STATUTES INVOLVED

The relevant statutory provisions are set forth in Appendix C, *infra*, pp. 37-38.

STATEMENT

Effective May 1, 1963, Plywood, Lumber and Saw Mill Workers, Local Union No. 2405, AFL-CIO, the certified representative of respondent's production and maintenance employees, entered into a collective bargaining agreement with the company. Article

XVII of the contract, captioned "Wages", provides in part (R. 19):[1]

> A. A classified wage scale has been agreed upon by the Employer and the Union, and has been signed by the parties and thereby made a part of the written agreement. The Employer reserves the right to pay a premium rate over and above the contractual classified wage rate to reward any particular employee for some special fitness, skill, aptitude or the like. * * *

Article XIX of the contract, captioned "Waiver of Duty to Bargain", provides (R. 19-20):

> The parties acknowledge that during negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter of collective bargaining, and that the understanding and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. Therefore, the Employer and Union, for the life of this Agreement, each voluntarily * * * waives the right and each agree that the other shall not be obligated to bargain collectively with respect to any subject matter not specifically referred to or covered in this Agreement * * *.

The contract contains no arbitration provision (Appendix B, *infra*, p. 28, n. 4).

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[1] "R" references are to Volume I of the record in the court below; "Tr." references are to the transcript of testimony in Volume II of that record; references designated "G.C.X." or "R.X." are to the exhibits of the General Counsel and respondent, respectively. A copy of this material has been filed with this petition.

The company employed approximately 26 to 32 men as members of several glue spreader crews.[1] The hourly rates of pay listed in the contract for members of the glue spreader crews were: sheet turner, $2.15; core feeder, $2.24; core layer, $2.29. (Appendix B, *infra*, p. 26, n. 1; G.C.X. 2, following p. 14.) All wage rates listed in the contract were declared closed "for the term of the * * * Agreement, subject to opening in the same manner as provided" in the contract termination provision (R. 20; G.C.X. 2, p. 12).

On May 20, 1963, the company posted a notice that, effective immediately and "for the next couple of months," members of the glue spreader crews would receive premium pay at the rate of $2.50 per hour provided that they met certain production standards (Appendix B, *infra*, p. 26 and n. 1; R. 21-22; Tr. 73-76; G.C.X. 3). The company formulated and placed in effect the premium pay schedule without prior notice to, or bargaining with, the union; the union learned about the plan from one of its members about a week after the plan was instituted (Appendix B, *infra*, p. 26; R. 22; Tr. 11, 70; G.C.X. 3).

By letter dated May 27, 1963, the union asked the Company for a conference to discuss the premium pay notice, stating (Appendix B, *infra*, p. 26):

> We do not consider this to be premium pay within the meaning of Article XVII, but rather a change in wages made dependent upon a production basis rather than hourly rates agreed upon by the Union. As a matter of fact while we are

[1] The total number of employees represented by the union was between 181 and 201 (R. 12, 20).

> perfectly willing to discuss increasing the hourly rates, or to the [company] putting into effect premium hourly rates, we do not consider the subject of production bonuses, or wage rates based upon production standards, to be properly open for negotiation at this time.

The parties met on June 7 and 15. The union requested rescission of the premium pay plan. The company refused, while offering to discuss the terms of the plan (Appendix B, *infra*, p. 26). The union thereupon filed unfair labor practice charges with the Board, alleging that the company had violated its bargaining obligation by unilaterally instituting the premium pay plan, and a complaint was issued (R. 3, 4-6).

Following the usual proceedings, the Board rendered a decision in which it rejected the company's contention that the Board lacked power to adjudicate the unfair labor practice question because a threshold question of contract interpretation was presented; found that the wage clause of the contract had not been intended to give the company the right unilaterally to put into effect a wage incentive plan for the glue spreader crews; and concluded that the company had violated Section 8(a)(5) of the National Labor Relations Act by taking such unilateral action. The Board ordered the company to cease and desist from the unfair labor practice found, to bargain with the union upon request with respect to the institution of a premium plan for the glue spreader crews, and, if requested by the union, to rescind any plan unilaterally instituted. (Appendix B, *infra*, pp. 27-33.)

The court of appeals declined to enforce the Board's order. It held that, "since the nature of the controversy is such that the existence or non-existence of an unfair labor practice does not turn entirely upon the provisions of the Act, but arguably upon a good-faith dispute as to the correct meaning of the provisions of the collective-bargaining agreement," the controversy was "beyond the subject-matter jurisdiction of the Board"; it was "a matter for arbitration where * * * the collective-bargaining agreement so provides, or for adjudication by the Courts," where, as here, there was no arbitration provision (Appendix A, *infra*, pp. 22, 21).

REASONS FOR GRANTING THE WRIT

The court of appeals in this case, following its own earlier decision (*Square D Co.* v. *National Labor Relations Board*, 332 F. 2d 360 (C.A. 9)), held that the Labor Board does not have power to adjudicate an unfair labor practice complaint where the determination whether the conduct complained of is in fact an unfair labor practice depends on how the collective bargaining contract between the parties is interpreted. The court's view was that in such a case the Board must stay its hand pending resolution of the contract question either by the arbitrator, if the contract provides for arbitration, or if (as here) it does not, by a court in a suit for breach of contract under Section 301 of the Labor-Management Relations Act. The Fifth Circuit has reached the same conclusion. *Sinclair Refining Co.* v. *National Labor Relations Board*, 306 F. 2d 569. The question decided in

these cases is a difficult, important, and recurring one in the administration of the federal labor laws. The answer given by the court below appears to be in conflict with applicable decisions of this Court and erroneous. In the circumstances, review by this Court is warranted.

1. It has been the consistent view of the Labor Board that its power to remedy unfair labor practices is not limited by the fact that conduct constituting an unfair labor practice may also violate the collective bargaining contract, thereby giving rise to remedies in addition to the Board's. See, *e.g.*, *International Harvester Co.*, 138 N.L.R.B. 923, 925. To be sure, the Board in such a case will not automatically exercise jurisdiction. As a matter of discretion it may decline to proceed, remitting the parties to their contract remedies. The Board would, for example, ordinarily consider this the appropriate course where an arbitration proceeding had already been instituted. See *United Telephone Company of the West*, 112 N.L.R.B. 779; *Morton Salt Co.*, 119 N.L.R.B. 1402; *National Dairy Products Corp.*, 126 N.L.R.B. 434. Such abstention comports with the established policy which favors the resolution of labor disputes through the grievance and arbitration procedure established in the collective bargaining contract. See Section 203(d) of the Labor-Management Relations Act; *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574; *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564; *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593.

But the Board does not mechanically decline jurisdiction in all cases where there may be overlapping

Board and contract remedies. If there is no question of contract interpretation that must be resolved before the determination of an unfair labor practice can be made, if the contract contains no arbitration procedure, or if the contract defense is insubstantial or incompatible with the policies of the National Labor Relations Act, the Board may proceed to an adjudication of the unfair labor practice complaint. See *Cloverleaf Division of Adams Dairy Co.*, 147 N.L.R.B. 1410; *Smith Cabinet Mfg. Co.*, 147 N.L.R.B. 1506; *Century Papers, Inc.*, 155 N.L.R.B. No. 40.

Thus, under the Board's view, the question whether to proceed in a case where there are duplicate remedies—Board and contract—for the complained of conduct is one of discretion, not power. That discretion was exercised reasonably here. To be sure, whether the company's refusal to bargain over the wage increases it gave the glue spreaders was unfair under Section 8(a)(5) of the National Labor Relations Act depended on whether the union—as it was free to do—had in Article XVII of the contract waived its statutory right to bargain over such increases; and this was a question of contract interpretation. But the Board noted that the parties had established no arbitration procedure for the speedy resolution of such questions, and that the question was in any event free from substantial difficulty or doubt. In the circumstances, the Board concluded that the basic goals of federal labor policy—industrial peace and stability through free collective bargaining—would be better served by the issuance of an unfair labor practice order than by remitting the parties to the delays and

uncertainties of full-blown court litigation under Section 301. We submit that this judgment was sound and within the Board's power.

2. The Board's view of its authority in cases of this sort finds support in the provision of Section 10 (a) of the National Labor Relations Act that the Board's authority to prevent unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise," and in decisions of this Court. In *Smith* v. *Evening News Assn.*, 371 U.S. 195, 197, the Court expressly stated that "[t]he authority of the Board to deal with an unfair labor practice which also violates a collective bargaining contract is not displaced by § 301 * * *." Similar expressions may be found in *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95, 101, n. 9, and *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261, 268, 271-272. To be sure, these judicial expressions were made in a context slightly different from that at bar. The question presented in each of these cases (except *Lucas*, which involved the distinct question whether Section 301 precludes State court actions to enforce collective bargaining contracts) was whether a suit under Section 301 was barred because the underlying conduct was also an unfair labor practice, rather than, as here, whether the presence of a question of contract interpretation litigable under Section 301 precludes the Board from acting upon an unfair labor practice complaint.

Furthermore, in those cases no question of contract interpretation would have had to be resolved by the

Board for it to determine whether an unfair labor practice had been committed. The provisions of the collective bargaining contracts on which the suits were based in each case merely repeated prohibitions contained in the National Labor Relations Act. The effect of the contract prohibitions was thus merely to give two remedies for the same misconduct—a Board remedy and a contract remedy—rather than to alter the parties' statutory rights and obligations. Here, it would have been impossible for the Board to adjudicate the unfair labor practice complaint without interpreting the contract. The employer violated Section 8(a)(5) of the Act only if the union did not waive its statutory bargaining right, which depends upon how Article XVII of the contract is interpreted. Hence, in exercising jurisdiction, the Board was compelled to interpret the contract—as would not have been necessary in *Smith* or *Carey*.

3. Admitting this possible distinction, we nonetheless believe that the decision below represents an unwise and unwarranted contraction of the Labor Board's authority. There are many cases—the present case, in our judgment, is one—in which an unfair labor practice proceeding may provide a more efficacious solution to a labor dispute than any other available remedy. Here, for example, since no arbitration procedure was established by the collective bargaining contract, the only alternative to the Board proceeding would have been a court proceeding under Section 301. Further, while a contract question was unavoidably presented by the unfair labor practice charge, it was, in the Board's view, a relatively simple

one. No reason appears why the Board should be absolutely foreclosed from proceeding in a case, like this, where it appears that the Board's proceeding is best designed to resolve the parties' differences with maximum dispatch. On the contrary, recognizing dual Board-court jurisdiction in such a case would impart a desirable flexibility to the legal machinery for solving labor disputes.

We find no bar to this result in the principle that the Board is without power to enforce collective bargaining contracts (*Dowd Box Co.* v. *Courtney*, 368 U.S. 502, 510) and, correlatively, that the Board in general does not adjudicate contract disputes (*National Labor Relations Board* v. *Hyde*, 339 F.2d 568, 572 (C.A. 9)). The Board's proceeding here was not one to enforce a provision of the collective bargaining contract, but to enforce Section 8(a)(5) of the National Labor Relations Act; the contract was relevant only as a possible defense to the unfair labor practice charge. To be sure, the Board was required to interpret the contract in the course of the unfair labor practice proceeding, but its contract determination was wholly incidental to its unfair labor practice determination. Surely the Board is not incapable of resolving incidental questions of contract interpretation arising in the course of its proceedings. If that were the rule, the Board would be ousted of its jurisdiction in every case where it was possible for the respondent to interpose a contract provision as an arguable defense—even where, as the Board found here, the defense was clearly without merit. Such a result would diminish the Board's authority under the National

Labor Relations Act far more than Congress can reasonably be thought to have intended by the enactment of Section 301.

Additionally, and most pointedly, nowhere in the language or legislative history of either the National Labor Relations Act or the Labor-Management Relations Act is there any indication that Congress meant to limit in the slightest the Board's remedial authority under the former Act. So drastic a result certainly cannot be supported by reference either to Section 203(d) of the Labor-Management Relations Act, which provides that "[f]inal adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement," or to this Court's expressions favoring the settlement of labor disputes through arbitration (*e.g.*, *Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574). The parties in this case established no arbitration procedure; and, as noted earlier, the Board has made clear that it will ordinarily stay its hand where such procedure is available and is invoked. Consequently, the Board's position imports no interference with the resolution of labor disputes through private grievance and arbitration machinery created by collective bargaining contracts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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JANUARY 1966.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 19,769

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

C & C PLYWOOD CORPORATION, RESPONDENT

[September 10, 1965]

On Petition to Enforce an Order of the National Labor Relations Board

Before: BARNES and KOELSCH, Circuit Judges, and MATHES, Senior District Judge

MATHES, Senior District Judge:

The National Labor Relations Board petitions to enforce its order of August 24, 1964, which directs among other things that respondent: "Upon request, bargain with Plywood, Lumber, and Sawmill Workers Union No. 2405, AFL-CIO, with respect to the institution of a premium pay plan for glue spreader crews and, if requested by said Union, rescind any plan which Respondent may have unilaterally instituted."

The order sought to be enforced is the culmination of Administrative proceedings which followed filing

by the union of a complaint before the Board on July 31, 1963, charging that respondent, as employer, "has engaged in and is engaging in unfair labor practices" within the meaning of section 8(a), subsections (1) and (5) of the National Labor Relations Act [29 U.S.C. § 158 (a) (1) and (5)], in that: "On or about May 20, 1963, the Employer unilaterally, and without agreement with representatives of its employees, changed the wages, rates of pay and conditions of certain of its employees at a time when such rates of pay, wages and conditions had just been incorporated in a signed contract with the Union and were not subject to renegotiation or change by either party."

Respondent conceded that at all times material to the proceeding, it was engaged in the business of processing and manufacturing plywood from green veneer at Kalispell, Montana; that since on or about August 28, 1962, the union had been the certified representative for purposes of collective bargaining of the employees involved and, as such, by virtue of § 9(a) of the Act [29 U.S.C. § 159(a)], had been and is now the exclusive bargaining representative of all employees in that unit; that from September, 1962, until May 1, 1963, the union and respondent engaged in a number of bargaining sessions culminating in a signed collective-bargaining agreement, effective from May 1, 1963, until October 31, 1963, but remaining in full force and effect from year to year thereafter, absent notice of a desire to change; that since on or about May 20, 1963, without consulting the union, the respondent unilaterally, and over the objection of the union, instituted a group wage incentive plan affecting approximately one-fourth of the employees in the appropriate bargaining unit.

Respondent denied the unfair-labor-practice charge, and asked the Board to dismiss the complaint. Re-

spondent's consistent position has been that the group wage incentive plan was instituted in the good-faith belief that the plan was permissible under the provisions of the collective-bargaining agreement and that, even if not expressly permitted, the only issue presented to the Board was a disagreement as to the proper interpretation of the contract. Thus respondent has contended throughout that the matter was not properly before the Board on an unfair-labor-practice charge.

The two articles of the collective-bargaining agreement relied upon by respondent are the following:

"Article XVII

"WAGES

"A. A classified wage scale has been agreed upon by the Employer and Union, and has been signed by the parties and thereby made a part of the written agreement. The Employer reserves the right to pay a premium rate over and above the contractual classified wage rate to reward any particular employee for some special fitness, skill, aptitude or the like. The payment of such a premium rate shall not be considered a permanent increase in the rate of that position and may, at sole option of the Employer, be reduced to the contractual rate at such time as the Employer feels that the employee no longer merits the premium, except that no present employee of the date of signing of this original Working Agreement shall suffer a wage reduction as a result of this Agreement.

* * * *

"Article XIX

"WAIVER OF DUTY TO BARGAIN

"The parties acknowledge that during negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter of collective bargaining, and that the understanding and agreement arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. Therefore, the Employer and Union, for the life of this Agreement, each voluntarily and unqualifiedly waives the right and each agrees that the other shall not be obligated to bargain collectively with respect to any subject matter not specifically referred to or covered in this Agreement, even though such subjects or matters may not have been within the knowledge or contemplation of either or both of the parties at the time they negotiated or signed this Agreement."

The Trial Examiner found that respondent acted in the good-faith belief that it was authorized by the above-quoted provisions of the collective-bargaining agreement to take the unilateral action it did with respect to the premium pay in question. The Examiner then concluded:

"General Manager Thomason's decision—so far as the record shows—was consciously reached within the framework of his firm's contract, as he construed it, and did not reflect a deliberate attempt to modify or terminate it. See *United Telephone Company of the West*, 111 NLRB 779. The Board's decision in the cited case—with re-

spect to circumstances substantially comparable —declared that:

> "Regarding the question of which party correctly interpreted the contract, the Board does not ordinarily exercise its jurisdiction to settle such conflicts. As the Board has held for many years, with the approval of the courts; '. . . it will not effectuate the statutory policy . . . for the Board to assume the role of policing collective contracts between employers and labor organizations by attempting to decide whether disputes as to the meaning and administration of such contracts constitute unfair labor practices under the Act.' "

The Trial Examiner thereupon recommended to the Board:

> "Upon these findings of fact and conclusions of law, and upon the entire record in the case, my recommendation is that the Board, pursuant to Section 10(c) of the National Labor Relations Act, as amended, dismiss the present complaint in its entirety."

The Board, with one member dissenting, reversed the Trial Examiner, observing in part:

> "The Trial Examiner found that the dispute between the Union and Respondent involved only a disagreement as to the meaning of terms of a collective-bargaining contract and that the promulgation of the premium pay plan according to Respondent's understanding of those terms was not a violation of Section 8(a)(5). We disagree.
>
> "In filing its unfair labor practice charge, the Union was complaining not of a violation of its

contract with Respondent, but of the invasion of its statutory right as collective-bargaining representative of employees in the unit to bargain about any change in the terms and conditions of employment for such employees."

Because the union elected to file an unfair labor practice complaint with the Board, rather than to proceed in the courts, the question presented involves the power of the Board under § 10(a):

> "The Board is empowered . . . to prevent any person from engaging in any unfair labor practice . . . affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise . . . ." [29 U.S.C. § 160(a).]

The proceeding before us is, therefore, to be distinguished from cases involving suits originally instituted in the courts under § 301(a) of the National Labor Relations Act. [29 U.S.C. § 185(a); *cf.*: *Humphrey* v. *Moore*, 375 U. S. 335 (1964); *Smith* v. *Evening News Assn.*, 371 U. S. 195 (1962); *Atkinson* v. *Sinclair Refining Co.*, 370 U. S. 238 (1962); *Retail Clerks Int. Assoc.* v. *Lion Dry Goods, Inc.*, 369 U. S. 17 (1962); *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U. S. 95 (1962); *Dowd Box Co., Inc.* v. *Courtney*, 368 U. S. 502 (1962); *San Diego Bldg. Trades Council* v. *Garmon*, 359 U. S. 236 (1959).]

We recently held in *Square D. Company* v. *N.L.R.B.*, 332 F. 2d 360 (9th Cir. 1964), that the Board has no jurisdiction to adjudge an unfair labor practice where "the existence of an unfair labor practice . . . is *dependent* upon the resolution of a preliminary dispute involving *only* the interpretation of the con-

tract". [Emphasis in the original, 332 F. 2d at 365-366.]

Although the Board contends that *Square D.* does not control our decision here, admittedly the majority of the Board found it necessary to "construe" the collective-bargaining agreement in order to find an unfair labor practice. Indeed, the Board majority "construed" the contract by looking back to negotiations presumably merged in the agreement, as well as to the provisions of the agreement itself, and by considering also the fact that the union made "prompt protest" against respondent's action, admittedly taken under what respondent conceived to be a proper interpretation of the agreement.

We note, moreover, that the rationale of the Board majority, in construing the contract as it did, was as unique as it was circuitous. The course of reasoning was that the provisions of the collective-bargaining agreement are "so contrary to labor relations experience" that the union should never have executed such a contract; and since the provisions in question should never have been agreed to by the union, it must be presumed that the union did not intend them, since the union's "prompt protest against Respondent's posting of the new wage schedule . . . belies any such intent".

The Board would distinguish the controversy here from that in *Square D.*, by quoting the language of our opinion recognizing the jurisdiction of the Board in instances of "a controversy over the applicability or violation of a duty not only prescribed by the contract but also imposed directly by the Act, disregard of which would constitute an unfair labor practice". [*Square D. Company* v. *N.L.R.B.*, *supra*, 332 F. 2d at 364.] But we find no support for the Board's position in that language.

Where the disputed provisions of a collective-bargaining agreement do no more than affirmatively prohibit conduct already defined and forbidden by the Act as an unfair labor practice, the Board can never be ousted of jurisdiction, for the reason that the controversy would involve no more than a breach of these negative contract provisions—a violation of duty already "imposed directly by the Act", irrespective of the contract itself. Were it otherwise, it would be a simple matter to remove from the jurisdiction of the Board all unfair labor practice disputes, by the facile device of prohibiting in the collective-bargaining contract all unfair labor practices defined in the Act.

The disputed provisions of the collective-bargaining agreement at bar clearly present quite a different situation from that just discussed. Here, the parties have arguably agreed affirmatively to permit conduct which, sans contract, the Act would admittedly condemn as an unfair labor practice. The resulting controversy then, as to whether the provisions of the contract positively sanction the action complained of, is a matter for arbitration where, as in *Square D.*, the collective-bargaining agreement so provides, or for adjudication by the Courts; and hence is beyond the subject-matter jurisdiction of the Board. This is necessarily so because, under the circumstances at bar, the very existence of the alleged unfair labor practice is "*dependent* upon the resolution of a preliminary dispute involving *only* the interpretation of the contract". [*Square D. Company* v. *N.L.R.B.*, *supra*, 332 F. 2d at 365-366.]

Since the Board has no jurisdiction to enforce collective bargaining agreements as such, both reason and policy dictate that adjudication of disputes, as to the scope of contractual rights and obligations, be by tribunals empowered to compel compliance with them.

As declared in *N.L.R.B.* v. *American National Ins. Co.*, 343 U.S. 395 (1952), "the Board may not, either directly or indirectly, . . . sit in judgment upon the substantive terms of collective bargaining agreements". [343 U. S. at 404; see also: *Dowd Box Co., Inc.* v. *Courtney, supra*, 368 U. S. at 510-513; *Square D. Company* v. *N.L.R.B., supra*, 332 F. 2d at 366; *In Re Morton Salt Co.*, 119 N.L.R.B. 1402, 1403 (1958); *In Re United Tel. Co. of the West*, 112 *N.L.R.B.*, 779, 781-782 (1955).]

Here, as in *N.L.R.B.* v. *Nash-Finch Co.*, 211 F. 2d 622 (8th Cir. 1954):

> "It seems to us that what the Board has done, under the guise of remedying unfair labor practices, is to attempt to bestow . . . benefits which it believes the Union should have obtained but failed to obtain . . . as a result of its collective bargaining with the respondent . . . ." [211 F. 2d at 627.]

Undeniably, the specific controversy at bar is whether the respondent or the union has correctly interpreted the quoted provisions of Section A of Article XVII of the collective-bargaining agreement. Moreover, since the nature of the controversy is such that the existence or non-existence of an unfair labor practice does not turn entirely upon the provisions of the Act, but arguably upon a good-faith dispute as to the correct meaning of the provisions of the collective-bargaining agreement, the Courts have jurisdiction. [*Square D. Company* v. *N.L.R.B., supra*, 332 F. 2d 360.] Although this may in some cases unavoidably delay exercise of the Board's unquestioned jurisdiction under § 10(a) of the Act to control unfair labor practices affecting commerce [29 U.S.C. § 160(a)], such a rule will not operate to encroach upon that jurisdiction.

For the reasons stated, the Board's petition to enforce the challenged order is denied, and the matter is remanded to the Board with directions to vacate the order and to dismiss the complaint, and all unfair-labor-practice proceedings herein, for lack of the Board's present jurisdiction over the subject matter.

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 19,769

DECREE

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

C & C PLYWOOD CORPORATION, RESPONDENT

Before: BARNES and KOELSCH, Circuit Judges, and MATHES, District Judge.

This cause came on to be heard upon the petition of the National Labor Relations Board, filed December 21, 1964, to enforce an order of said National Labor Relations Board issued by it on August 24, 1964, against the respondent, its officers, agents, successors and assigns, and of the answer, filed January 8, 1965, to said petition.

The court heard argument of respective counsel on July 9, 1965, and has considered the transcript of record and briefs filed in this cause.

On September 10, 1965, the court being fully advised in the premises, handed down its decision, and in conformity thereto,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED by the United States Court of Appeals for the Ninth Circuit that the petition of the National Labor Relations Board be, and hereby is denied, and that this case be, and hereby is remanded to the said Board with directions to vacate the order and to dismiss the complaint, and all unfair-practice proceedings herein for lack of the Board's present jurisdiction over the subject matter.

(Endorsed) Decree.
Filed and Entered September 10, 1965.
Frank H. Schmid, Clerk

APPENDIX B

UNITED STATES OF AMERICA

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case No. 19-CA-2686

C & C PLYWOOD CORPORATION

and

PLYWOOD, LUMBER AND SAWMILL WORKERS LOCAL UNION No. 2405, AFL-CIO

DECISION AND ORDER

On January 3, 1964, Trial Examiner Maurice M. Miller issued his Decision in the above-entitled proceeding, finding that Respondent had not engaged in unfair labor practices and recommending that the complaint be dismissed in its entirety, as set forth in the Trial Examiner's Decision attached hereto. Thereafter, the General Counsel and the Charging Party each filed exceptions to the Decision and a supporting brief. Respondent filed a brief in support of the Decision.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions, the briefs, and the entire record in the case, and finds merit in the exceptions. Accordingly, the Board adopts only so much of the findings, conclusions, and recommendations of the Trial Examiner as are consistent with this Decision.

On May 1, 1963, Respondent and the Union entered into a collective-bargaining agreement effective to October 31, 1963. The agreement contained a wage clause in Article XVII which stated in part:

> The Employer reserves the right to pay a premium rate over and above the contractual classified wage rate to reward any particular employee for some special fitness, skill, aptitude, or the like.

On May 20, 1963, Respondent posted a notice announcing that effective immediately and "for the next couple of months," members of the glue spreader crews would receive premium pay provided that they met certain production standards.[1]

Respondent formulated and placed in effect the premium pay schedule without prior notice to, or bargaining with, the Union. About a week later the Union learned of the plan from one of its members. By letter dated May 27, the Union asked Respondent for a conference to discuss the premium pay notice. In the letter, the Union said:

> We do not consider this to be premium pay within the meaning of Article XVII, but rather a change in wages made dependent upon a production basis rather than hourly rates agreed upon with the Union.

The parties met on June 7 and 15, 1963. The Union requested rescission of the plan. Respondent refused although it offered to discuss terms of the plan. The Union then filed the present unfair labor practice charges alleging that Respondent had unlawfully re-

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[1] The contract rates of pay for members of the glue spreader crew were: core feeder, $2.24; core layer, $2.29; sheet turner, $2.15. The premium pay schedule provided for an hourly rate of $2.50 to each member of the crew.

fused to bargain by unilaterally establishing the premium pay plan.

The Trial Examiner found that the dispute between the Union and Respondent involved only a disagreement as to the meaning of terms of a collective-bargaining contract and that the promulgation of the premium pay plan according to Respondent's understanding of those terms was not a violation of Section 8(a)(5). We disagree.

In filing its unfair labor practice charge, the Union was complaining not of a violation of its contract with Respondent, but of the invasion of its statutory right as collective-bargaining representative of employees in the unit to bargain about any change in the terms and conditions of employment for such employees.[2] *Prima facie*, Respondent's change in the terms for compensating glue spreader crews without notification to, or bargaining with, the Union violated Section 8(a)(5).[3] The Board has recognized, however, that the statutory right of a union to bargain about changes in terms and conditions of employment may be waived by the union. Respondent's affirmative defense to the *prima facie* case is that there was such a waiver in this case. It contends: (a) during the contract negotiations, the Union waived its right to be consulted about group incentive pay; and (b) the

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[2] *Timken Roller Bearing Co.* v. *N.L.R.B.*, 325 F. 2d 746 (C.A. 6); *Smith Cabinet Mfg. Co., Inc.*, 147 NLRB No. 168. This is not a case like *United Telephone Company of the West*, 112 NLRB 779, or *Morton Salt Company*, 119 NLRB 1402, relied upon by the Trial Examiner, where an alleged breach of contract was the very basis for the 8(a)(5) allegation in the first case, and for the 8(a)(1) and (2) allegations in the second.

[3] *N.L.R.B.* v. *Katz*, 369 U.S. 736.

wage clause in the contract gave the Respondent the right unilaterally to put into effect a wage incentive plan.

In order to determine the validity of this waiver defense, the Board must necessarily evaluate the testimony as to what occurred during contract negotiations, and must interpret the wage clause of the contract. We find no obstacle to either course. The Board is not unfamiliar with the problems of contract construction. For example, it is frequently required to construe contracts in representation cases when a contract is claimed to be a bar to a representation petition, and in unfair labor practice proceedings involving the meaning and validity of union-security clauses, or clauses alleged to be violative of Section 8 (e). Moreover, this is not a case where the identical question of contract construction is pending before a civil court or an arbitrator and in the interests of comity, the Board defers to the other tribunal.[4] Accordingly, we reject the argument that, because determination of the validity of the defense involves construction of the collective-bargaining contract, the complaint alleging an 8(a)(5) violation should be dismissed.[5]

(a) Waiver of a statutory right will not lightly be inferred. The relinquishment to be effective must be "clear and unmistakable."[6] Or as the Board said in the *Proctor Manufacturing* case:[7]

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[4] See *National Dairy Products Co.*, 126 NLRB 434; *United Telephone Company of the West, supra.* The contract between the Union and Respondent contains no provision for arbitration.

[5] *Smith Cabinet Manufacturing Company, Inc., supra.*

[6] *Timken Roller Bearing Co.* v. *N.L.R.B., supra.*

[7] *Proctor Manufacturing Co.*, 131 NLRB 1166, 1169.

> The Board's rule, applicable to negotiations during the contract term with respect to the subject which has been discussed in precontract negotiations but which has not been specifically covered in the resulting contract, is that the employer violates Section 8(a)(5) if, during the contract term, he refuses to bargain or takes unilateral action with respect to the particular subject, unless it can be said from an evaluation of the prior negotiations that the matter was "fully discussed" or "consciously explored" and that the Union "consciously yielded" or clearly and unmistakably waived its interest in the matter.

In the present case, the Trial Examiner found that during contract negotiations, Respondent's negotiator mentioned that Respondent was "giving thought" to the possibility of promulgating a premium pay or incentive wage program for glue spreader crews. This alone, although in the context of a resulting contract which does not "specifically cover" a group incentive pay plan, is not a waiver by the Union under the above standard. In addition, we believe that any conclusion that the Union "consciously yielded" on the *group* suggestion made by the Respondent is negated by the inclusion in the contract of a specific provision for *individual* premium pay. Moreover, the Trial Examiner found that this comment was made at a bargaining session when the parties had reached an impasse over the hourly rates for the three job classifications which constituted the glue spreader crews.

Accordingly, we find that there is not sufficient evidence under the above standard to establish that the Union waived its right to bargain about a wage incentive system.

(b) The wage clause gives Respondent the right to pay a premium rate to "reward any particular em-

ployee for some special fitness, skill, aptitude, or the like." It seems to us that this clause grants the Employer the right to make individual merit increases for special competence or skill. We do not construe it, as Respondent apparently does, to authorize Respondent to select a group of employees and unilaterally change the method of compensating them from a straight hourly basis, with a fixed rate for each job category, to what is in effect a production basis, by raising the hourly contract wage rate contingent upon increased productivity. To accept Respondent's construction is tantamount to saying that the Union inferentially surrendered to Respondent the right unilaterally to establish production standards and wage rates based thereon as a method for compensating employees. Such an intent is so contrary to labor relations experience that it should not be inferred unless the language of the contract or the history of negotiations clearly demonstrates this to be a fact. We see nothing in these negotiations or this contract to establish that the Union intended to waive its statutory right to bargain over the matter in dispute. The Union's prompt protest against Respondent's posting of the new wage schedule also belies any such intent.

Accordingly, we find that by unilaterally changing the wage rates for members of the glue spreader crews Respondent violated Section 8(a)(5) and (1) of the Act.

The effect of the unfair labor practice upon commerce

The conduct of the Respondent set forth above, occurring in connection with the operations of Respondent as set forth in Section I of the Trial Examiner's Decision, has a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tends to lead to labor disputes burdening

and obstructing commerce and the free flow of commerce.

The Remedy

Having found that Respondent has engaged in certain unfair labor practices, we shall order that it cease and desist therefrom, and from like or related conduct, and that it take certain affirmative action to effectuate the policies of the Act.

Conclusions of Law

1. C & C Plywood Corporation is an employer within the meaning of Section 2(2) of the Act, engaged in commerce and business affecting commerce within the meaning of Section 2(6) and (7) of the Act.
2. Plywood Lumber and Sawmill Workers Local Union No. 2405, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.
3. By instituting a premium pay plan for glue spreader crew workers without notice to, or bargaining with, the Union, Respondent violated Section 8(a)(5) and (1) of the Act.
4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Failing or refusing to bargain collectively with Plywood, Lumber and Sawmill Workers Local Union No. 2405, AFL-CIO, as the exclusive representative of

its employees in the appropriate bargaining unit,[8] by unilaterally instituting a premium pay plan for glue spreader crews or otherwise changing any term or condition of employment of employees within the aforesaid unit without prior notice to, and bargaining with, the Union.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which it is found will effectuate the policies of the Act.

(a) Upon request, bargain with Plywood, Lumber, and Sawmill Workers Local Union No. 2405, AFL-CIO, with respect to the institution of a premium pay plan for glue spreader crews and, if requested by said Union, rescind any plan which Respondent may have unilaterally instituted.

(b) Post in its plant in Kalispell, Montana, copies of the notice attached hereto marked "Appendix."[9] Copies of such notice, to be furnished by the Regional Director for the Nineteenth Region, shall, after being duly signed by an authorized representative of Respondent, be posted immediately upon receipt thereof, and be maintained by it for a period of 60 consecutive days thereafter, in conspicuous places, including

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[8] The appropriate unit is composed of all production and maintenance employees of the Respondent at its veneer and plywood plants near Kalispell, Montana, excluding office clerical employees, guards, professional employees, and supervisors as defined in the Act.

[9] In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for the Nineteenth Region, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith.

Dated, Washington, D. C., August 24, 1964

Frank W. McCulloch, Chairman

John H. Fanning, Member

Howard Jenkins, Jr., Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

Member Leedom, dissenting:

Unlike my colleagues, I would affirm the Trial Examiner for the reasons indicated in his Decision. As the Trial Examiner there points out, the Board has long held that it will not effectuate the policies of the Act for it to police collective-bargaining agreements by attempting to resolve disputes over their meaning, whatever a proper construction of the disputed language in the contract may be, where it is evident that the Respondent acted reasonably and in good faith.

In such cases, the aggrieved party's remedy is to seek judicial or other enforcement of the contract.

As the Trial Examiner found, this is precisely such a case. My colleagues do not purport to depart from the *United Telephone* case, 112 NLRB 779, relied on by the Trial Examiner here, where the Board applied this salutary rule. Contrary to my colleagues, the case at bar differs in no significant respect from *United Telephone*.[10] There, as well as here, the employer, *prima facie*, violated the Act by unilaterally changing terms or conditions of employment; in both cases, the terms of the contract at least colorably justified the employer's good-faith making of the change; and here, as well as there, the parties disagreed with respect to the meaning of the contract, and a determination as to whether the employer violated the Act turns upon a proper construction of the contract. In these circumstances, the Union's remedy is before another forum.

Accordingly, like the Trial Examiner, I would dismiss the complaint.

Dated, Washington, D. C.

Boyd Leedom, Member

NATIONAL LABOR RELATIONS BOARD

[10] While it is true that the pendency of a civil suit calling for interpretation of the contract was an additional reason for dismissal of the complaint in *United Telephone*, the fact that, here, no such suit is pending and there is no provision in the contract for arbitration, does not alter the established rule that the Board is not the proper forum to remedy a breach of contract or to obtain specific performance of its terms.

APPENDIX [TO BOARD DECISION]

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT fail or refuse to bargain collectively with PLYWOOD, LUMBER AND SAWMILL WORKERS LOCAL UNION NO. 2405, AFL-CIO, by unilaterally instituting a premium pay plan for glue spreader crews or otherwise changing any term or condition of employment in the unit composed of:

All production and maintenance employees at our veneer and plywood plants near Kalispell, Montana, excluding office clerical employees, guards, professional employees, and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in Section 7 of the National Labor Relations Act.

C & C PLYWOOD CORPORATION
(Employer)

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, 327 Logan Building, 500 Union Street, Seattle, Washington, 98101 (Tel. No. MUtual 2-3300), if they have any question concerning this notice or compliance with its provisions.

APPENDIX C

The relevant provisions of the Labor-Management Relations Act, 1947 (61 Stat. 136, 29 U.S.C., 151, *et seq.*) are as follows:

TITLE I—AMENDMENT OF NATIONAL LABOR RELATIONS ACT

* * * * * *

Sec. 8.(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * *

Sec. 10.(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

* * * *

TITLE II—CONCILIATION OF LABOR DISPUTES IN INDUSTRIES AFFECTING COMMERCE; NATIONAL EMERGENCIES

* * * *

Sec. 203. * * * (d) Final adjustment by a method agreed upon by the parties is hereby de-

clared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

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TITLE III—SUITS BY AND AGAINST LABOR ORGANIZATIONS

Sec. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

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